

No. 83-76

In The
Supreme Court of the United States

October Term, 1983

AUG 16 1983
ALEXANDER L. STEVENS,
CLERK

PETER CHILDREN,

Petitioner,

vs.

JAMES R. BURTON, VICTOR DUNN and
CITY OF CHARLES CITY, IOWA,

Respondents.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA**

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QUESTIONS PRESENTED

1. Has Petitioner Failed To Show Any Special And Important Reasons For Grant Of Review On Certiorari?
2. Did Petitioner Fail To Timely Raise Any Federal Question?
3. Is the Decision Of The Iowa Supreme Court Supported By Adequate Independent State Grounds?
4. Is The Decision Of The Iowa Supreme Court Correct On the Merits?

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STATEMENT OF THE CASE

Petitioner's Statement of the Case contains the following inaccuracies:

(a) The record does not establish that the arrest was made solely for an alleged indecent exposure at the Stevenson's store, but rather contains evidence that the arrest was made for that incident and a number of other indecent exposures as well;

(b) The record does not establish that Children was never taken before a Magistrate for a probable cause determination. That was not an issue at trial and was not litigated by the parties;

(c) It is not correct that the Charles City Police announced to the news media immediately after Children's arrest that they had arrested him for indecent exposure. There was no evidence that the Charles City Police "announced" anything to the news media, and no stories appeared in the media until approximately twenty-four hours after Children had been released and also after he had been charged with an incident of indecent exposure upon the advice of the County Attorney.

Petitioner's Statement of the Case also does not indicate that the case was submitted to the trial Court solely on the theory of false arrest, and not upon any theory of malicious prosecution, violation of civil rights, denial of due process, or breach of any statutory or constitutional duty to take the accused before a Magistrate; and that Petitioner raised no issue as to the constitutionality of the elements of the Iowa common law tort of false arrest until his Petition for Rehearing after final judgment had been entered in the Supreme Court of Iowa.

STATEMENT OF THE FACTS

Respondents reject Petitioner's Statement of the Facts and take particular exception to its introductory paragraph. It is utterly irrelevant in this proceeding what the trial jury concluded from the evidentiary facts, for the Iowa Supreme Court in its opinion held that those facts established probable cause as a matter of law.

In lieu of Petitioner's Statement of the Facts, Respondents adopt the Statement of Facts made by the Iowa Supreme Court in its opinion and set forth at A.2-12; *Children v. Burton*, 331 N.W. 2d 673, 674-678 (Iowa 1983).

SUMMARY OF ARGUMENT

Respondents submit that this Court lacks jurisdiction to review this matter on Writ of Certiorari because Petitioner did not timely raise any Federal question in State Court as required by 28 U.S.C. § 1257 (3).

In addition, Petitioner has not raised an important question of Federal law or demonstrated that the Iowa Supreme Court has decided a question of Federal law in conflict with the decisions of this Court or a Federal Court of Appeals so as to establish special and important reasons for review on certiorari within the meaning of this Court's Rule 17.

Rather than resting on Federal grounds, the decision of the Iowa Supreme Court below is supported by adequate and independent State grounds both procedurally and substantively and is correct on its merits.

ARGUMENT

I.

Petitioner Has Not Shown Any Special And Important Reasons For Grant Of Review On Certiorari.

Under this Court's Rule 17 a review on Writ of Certiorari will be granted only when there are "special and important reasons therefor". Examples of such reasons relevant to this case are set forth at Subsections (b) and (c) of Rule 17 and include the decision of a Federal question by a State Court of last resort in conflict with the decision of another State Court of last resort, a Federal Court of Appeals, or the United States Supreme Court itself; and the decision of an important question of Federal law by a State Court which has not been, but should be, settled by the Supreme Court.

Initially, Respondents submit that Petitioner has raised no important question of Federal law. Petitioner's Questions Presented erroneously mistate and misconstrue the holding of the Iowa Supreme Court below and cannot be considered at face value.

Petitioner's Question 1 incorrectly states that the Iowa Supreme Court's construction of probable cause for a warrantless arrest essentially gives a peace officer in the State of Iowa the right to arrest a person on a general suspicion that the person is a criminal irrespective of whether the peace officer has any information that a specific crime has been committed. This allegation by Petitioner is based upon a misconstruction of the facts and of the Iowa Supreme Court's decision. It is plain from

Division I. B of its opinion (A13-16) that the Iowa Supreme Court followed the pronouncements of this Court and the Federal Courts of Appeals in defining probable cause. Also, Petitioner is apparently confusing the Iowa Supreme Court's language at Division I. C of its opinion as applying to criminal cases, rather than only to civil tort actions in which the issue is whether liability will be imposed upon a police officer for a warrantless arrest. However, the Iowa Supreme Court was very careful and explicit in limiting application of the "good faith" standard to civil actions:

In dealing with civil damages for false arrest, Courts apply a probable cause standard less demanding than the Constitutional probable cause standard in criminal cases. If the officer acts in good faith and with reasonable belief that a crime has been committed and the person arrested committed it, his actions are justified and liability does not attach.

A.16; *Children v. Burton*, 331 N.W.2d 673, 680 (Iowa 1983).

This same confusion of civil and criminal case standards is carried over to Petitioner's Question 3. Petitioner's Question 2 lacks basis in the record in its assertion that the Iowa Supreme Court has erroneously equated the Constitutional grounds for a warrantless arrest with the grounds set forth for an investigative stop in *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S. Ct. 1868 (1968), for the Iowa Supreme Court opinion makes no reference at all to the *Terry* case or its principles.

An examination of Petitioner's Argument reveals that he is really attempting to raise two very different questions from those he has stated. First, he is claiming that the United States Constitution precludes the Iowa Supreme Court from adopting a more relaxed standard of probable cause for imposing common law civil tort liability

upon a police officer for a warrantless arrest than it applies in the context of a criminal proceeding such as a determination of the validity of a search incident to a warrantless arrest. Second, Petitioner is claiming that the United States Constitution precludes the Iowa Supreme Court from determining as a matter of law what facts are sufficient to constitute the defense of probable cause in a common law civil tort action for false arrest.

Even if these are conceded to be important Federal questions, which Respondents deny, Petitioner has failed to make any showing that the decision of the Iowa Supreme Court is in conflict with any decision of this Court, a Federal Court of Appeals, or another State Court of last resort, or that the question has not been but should be decided by this Court. This Court expressed its recognition and approval of the "good faith and probable cause" standard for common law false arrest actions and statutory civil rights actions in *Pierson v. Ray*, 386 U.S. 547, 556-557, 18 L.Ed. 2d 288, 295-296, 87 S. Ct. 1213 (1967). Federal Appeals Court decisions enunciating the same standard include *Connors v. McNulty*, 697 F. 2d 18 (1st Circuit 1983); *Smiddy v. Varney*, 665 F. 2d 261 (9th Cir. 1981), cert. denied, — U.S. —, 74 L. Ed. 2d 66, 103 S. Ct. 65 (1982); *Greer v. Turner*, 639 F. 2d 229 (5th Cir. 1981); *Dellums v. Powell*, 566 F. 2d 167 (D. C. Cir. 1977) cert. denied, 438 U.S. 916, 57 L.Ed. 2d 1161, 98 S. Ct. 3146 (1978); *Tritsis v. Backer*, 501 F. 2d 1021 (7th Cir. 1974); *Hill v. Rowland*, 474 F. 2d 1374 (4th Cir. 1973); and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F. 2d 1339 (2nd Cir. 1972).

It can thus be seen that the decision of the Iowa Supreme Court below is in accord rather than conflict with the decisions of this and other Courts.

II.

Petitioner Did Not Timely Raise Any Federal Question.

As relevant to this Petition, 28 U.S.C. § 1257 (3) provides that this Court can review the final judgment of a State Court by Writ of Certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

This Court obtains jurisdiction under this provision only where the record as a whole shows either expressly or by clear implication that the Federal claim was adequately presented in the State Court system. Litigants who seek to bring cases to this Court from State Courts of last resort must present the Federal issues first in the State Court system both as a matter of comity and to afford the parties the opportunity to develop the record necessary for adjudicating the issue. The State Courts must be permitted to exercise their authority to avoid, obviate or correctly decide Federal Constitutional issues as well as to identify independent and adequate State grounds for decision. *Webb v. Webb*, 451 U.S. 493, 68 L.Ed. 2d 392, 101 S. Ct. 1889 (1981).

There is a long-established general rule that an attempt to raise a Federal question after judgement of the State's highest Court upon a Petition for Rehearing before it comes too late, unless the State Court actually entertains the question and decides it or unless Petitioner makes a showing that the ruling of the State Court could not have been anticipated and that a Petition for Rehearing therefore presented the first opportunity for raising the Federal claim. *Herndon v. Georgia*, 295 U.S. 441, 443-444, 79 L.Ed. 1530, 1532-1533, 55 S. Ct. 794 (1935); *Hanson*

v. Denckla, 357 U.S. 235, 244; 2 L. Ed. 2d 1283, 1292, 78 S. Ct. 1228 (1958).

Petitioner in his Statement of Jurisdiction concedes that the Constitutional grounds submitted in his Petition were first raised before the Iowa Supreme Court by Petition for Rehearing after entry of judgment. It is plain from the face of the Iowa Supreme Court's Order set forth at A.34 that in denying the Petition for Rehearing it did not actually entertain and decide the Constitutional questions. Therefore, this Court has jurisdiction over the Petition only if Petitioner can establish that the disputed portion of the Iowa Supreme Court's decision could not have been anticipated by him.

As noted in Division I of this Argument, Petitioner is in essence attempting to set forth two Federal Constitutional questions: (1) that the United States Constitution precludes the Iowa Supreme Court from adopting a more relaxed standard of probable cause for imposing common law civil tort liability upon a police officer for a warrantless arrest than it applies in the context of a criminal proceeding such as a determination of the validity of a search incident to a warrantless arrest; and (2) that the United States Constitution precludes the Iowa Supreme Court from determining as a matter of law what facts are sufficient to constitute the defense of probable cause in a common law civil tort action.

Prior to this decision, the Iowa Supreme Court had applied a "good faith and probable cause" standard to cases of malicious prosecution, *Schnathorst v. Williams*, 240 Iowa 561, 36 N.W. 2d 739, 748 (1949); and to actions involving the mistaken execution of a warrant, *O'Neill v.*

Keeling, 227 Iowa 754, 288 N. W. 887, 889 (1939). Further, this Court in *Pierson v. Ray*, 386 U.S. 547, 556-557, 18 L.Ed. 2d 288, 295-296, 87 S. Ct. 1213 (1967) characterized the defense of "good faith and probable cause" as being the general common law rule in actions for false arrest and adopted that standard in civil rights actions under 42 U.S.C. § 1983.

The Iowa Supreme Court had also previously held in an action for false arrest that where there is no conflict in the evidence, or where but one conclusion may reasonably be reached therefrom, the Court must determine the existence of probable cause as a matter of law. *Sergeant v. Watson Bros. Transp. Co.*, 244 Iowa 185, 52 N.W. 2d 86, 91 (1952).

Based upon this status of the common law as it existed prior to the present decision, Petitioner knew or should have known that the Iowa Supreme Court would apply the "good faith and probable cause" standard, and therefore Petitioner cannot claim that the Federal claims he now raises were unanticipated. As a result, this Court lacks jurisdiction.

III.

The Decision Of The Iowa Supreme Court Is Supported By Adequate Independent State Grounds.

Where the judgement below rests on an independent and adequate State ground, certiorari should not be granted, for this Court's only power over State judgments is to correct them to the extent that they incorrectly adjudge Federal rights. *Zacchini v. Scripps-Howard*

Broadcasting Co., 433 U. S. 562, 566, 53 L. Ed. 2d 965, 970, 97 S. Ct. 2849 (1977).

Such an adequate and independent State ground need not be substantive but may also be procedural as long as the procedure is not an obvious subterfuge to evade consideration of Federal issues. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129, 89 L.Ed. 2092, 2100, 65 S. Ct. 1475 (1945). A claim is not properly presented to this Court and is found to rest on adequate independent State grounds where the State Court declined to pass upon the question because it was not properly raised under State practice. *Louisville & N.R. Co. v. Woodford*, 234 U.S. 46, 58 L. Ed. 1202, 1208, 34 S. Ct. 739 (1914).

Respondents submit that the decision of the Iowa Supreme Court below rests on adequate and independent State grounds, both procedural and substantive.

Procedurally, Petitioner failed to timely raise his Constitutional claims under Iowa law. An attack on an Iowa Supreme Court decision based upon Constitutional grounds cannot be first raised on a Petition for Rehearing, *Fleming v. Fleming*, 194 Iowa 71, 184 N.W. 296 (1921), error dismissed, 264 U.S. 29, 68 L.Ed. 547, 44 S. Ct. 246 (1924), nor for that matter can any theory of the case be presented for the first time on Petition for Rehearing in the Iowa Supreme Court. *Wehrman v. Farmers' and Merchants' Sav. Bank of Durant*, 221 Iowa 249, 266 N.W. 290 (1936); *Middle States Utilities Co. v. City of Osceola*, 231 Iowa 462, 1 N.W. 2d 643 (1942). Further, the Iowa Supreme Court will not consider on appeal a theory or issue not raised in the trial Court below. *Aetna Casualty and Surety Co. v. Jewett Lumber Co.*, 209 N.W. 2d 48, 50

(Iowa 1973); *Haggarty v. Dysart-Geneseo Community School*, 282 N.W. 2d 92, 94 (Iowa 1979).

Substantively, the decision rests on the adequate and independent State grounds that the Iowa Supreme Court is free to determine as a matter of State law the elements of the common law civil tort action of false arrest and is also free to determine as a matter of state law the quantum of proof necessary to establish "good faith and probable cause" as a matter of law. The Courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U. S. 673, 680, 74 L. Ed. 1107, 1113, 50 S. Ct. 451 (1930). This Court accords "respectful consideration and great weight" to the views of the State's highest Court on matters of State law and customarily accepts the factual findings of State Courts in the absence of "exceptional circumstances". *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 111, 63 L.Ed. 2d 233, 247, 100 S. Ct. 937 (1980); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160, 97 L.Ed. 168, 172, 73 S. Ct. 204 (1952).

Accordingly, it is for the Iowa Supreme Court rather than the United States Supreme Court to determine the elements of an Iowa common law tort action and the quantum of proof necessary to substantiate a defense as a matter of law in such an action.

IV.

The Decision Of The Iowa Supreme Court Is Correct On The Merits.

As previously pointed out in Division I of this Argument, the Iowa Supreme Court applied the generally accepted common law standard of "good faith and probable cause" which provides a police officer with a defense from imposition of civil liability in a common law false arrest action. *Pierson v. Ray*, 386 U.S. 547, 18 L.Ed. 2d 288, 87 S. Ct. 1213 (1967).

The Iowa Supreme Court also correctly determined that probable cause existed under the facts of this case.

Petitioner attempts to make much of the fact that June Temple and Pat Hawk did not use the precise words of the Iowa indecent exposure statute when they asked Officer Dunn to arrest Children. Petitioner would have the Court find that Temple and Hawk should have told Dunn that Children had exposed his "genitals or pubes" and that by identifying him as the "flasher" or "exposer" they were insufficiently specific. Plainly, however, these words connote the exposure of a person's genitals, the very thing prohibited by the statute. Such technicality as sought by Petitioner is not required in a determination of probable cause. *Draper v. United States*, 358 U.S. 307, 313, 3 L.Ed. 2d 327, 332, 79 S. Ct. 329 (1959); *State v. Freeman*, 297 N.W. 2d 363, 366 (Iowa 1980). Under these authorities, probable cause does not require technicalities or certainties, but only reasonable probabilities.

Other attempts by Petitioner to defeat a finding of probable cause are also without merit, the applicable law being as follows:

(a) The existence of probable cause must be determined at the time of the arrest and cannot be defeated by subsequent events. *Beck v. Ohio*, 379 U.S. 89, 91, 13 L.Ed. 2d 142, 145, 85 S. Ct. 223, 225 (1964); *State v. Vallier*, 159 N.W. 2d 406, 408 (Iowa 1968);

(b) The knowledge of the entire police department can be considered in assessing probable cause, and it is not necessary that the arresting officer have personal knowledge of the facts constituting probable cause. *State v. Thornton*, 300 N.W. 2d 94, 97 (Iowa 1981);

(c) Probable cause may be supported by the identification of an eyewitness, and it is not necessary that identification be made by the victim of the crime. *State v. Shane*, 255 N.W. 2d 324 (Iowa 1977); *Commonwealth v. Irving*, 485 Pa. 596, 403 A. 2d 549, 551 (1979), cert. denied, — U. S. —, — L. Ed. 2d —, — S. Ct. —;

(d) The modus operandi of the suspect can be considered in establishing probable cause. *Greer v. Turner*, 639 F. 2d 229 (5th Cir. 1981);

(e) An incorrect statement of the grounds for arrest by the arresting officer will not defeat probable cause. *United States v. Brookins*, 434 F. 2d 41, 44-45 (5th Cir. 1970), cert. denied, 401 U.S. 912, 27 L.Ed. 2d 811, 91 S. Ct. 880 (1971); *Klingler v. United States*, 409 F. 2d 299 (8th Cir. 1969), cert. denied, 396 U.S. 859, 24 L.Ed. 2d 110, 90 S. Ct. 127 (1969).

Respondents submit that even under these and other criminal case decisions, probable cause was established as a matter of law. That result is even more clearly mandated under the more relaxed "good faith and probable cause" standard applicable to this false arrest action.

CONCLUSION

Respondents respectfully request that this Court deny this Petition for Writ of Certiorari to the Supreme Court of Iowa.

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